

1 or denying a certificate of appealability.


2 A certificate of appealability may issue under 28
3 U.S.C. § 2253 "only if the applicant has made a substantial
4 showing of the denial of a constitutional right." 28 U.S.C.
5 § 2253(c)(2). This court is unable to discern any issue that
6 petitioner can demonstrate is "'debatable among jurists of
7 reason,'" could be resolved differently by a different
8 court, or is "'adequate to deserve encouragement to proceed
9 further.'" See Jennings v. Woodford, 290 F.3d 1006, 1010 (9th
10 Cir. 2002) (quoting Barefoot v. Estelle, 463 U.S. 880, 893
11 (1983)).

12 First, while the writ of audita querela may have
13 historically had some application at common law, it has no
14 application in present day criminal proceedings in the federal
15 courts. Second, construing the petition as an application for
16 relief under 28 U.S.C. § 2255, for the reasons explained with
17 clarity in the magistrate judge's Findings and Recommendations,
18 filed April 5, 2013, because defendant previously filed a motion
19 to vacate pursuant to 28 U.S.C. § 2255, he must move in the Court
20 of Appeals for an order authorizing this court to consider his
21 present application before this court may consider them. See 28
22 U.S.C. § 2244. This court's order denied defendant's motion
23 without prejudice to his seeking such certification from the
24 Court of Appeals.

25 IT IS THEREFORE ORDERED that a certificate of
26 appealability be, and the same hereby is, DENIED. The Clerk of

1 this court is ordered to forward a copy of this order to the
2 Clerk of the United States Court of Appeals for the Ninth Circuit
3 forthwith.

4 DATED: July 23, 2013

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7 WILLIAM B. SHUBB
8 UNITED STATES DISTRICT JUDGE
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